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IN THE

Supreme Court of the United States

October Term, 1961.

No. 740

EDWARD WRIGHT, MAXINE WRIGHT, PEYTON SMITH, MILDRED SMITH, LEXTON SMITH and RICHARD HELLER,

Petitioners,

v.

DONALD C. WAGNER, DAVID M. SMALLWOOD and CITY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	5
Appendix	1a
Adjudication of the Court of Common Pleas No. 6 of Philadelphia County	1a
Opinion of the Court of Common Pleas No. 6 of Philadelphia County Sur Exceptions to Adjudication	31a
Opinion of the Supreme Court of Pennsylvania	40a
Dissenting Opinion of the Supreme Court of Pennsylvania	45a

STATUTES CITED.

	Page
28 U. S. C. 1257(3)	2
United States Constitution, 14th Amendment	2, 4

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To the Honorable, the Justices of the Said Court:

The Petition of the Appellees in the above case by their attorney, Isidore Ostroff, respectfully petitions for a writ of certiorari to review the Decree of the Supreme Court of Pennsylvania entered on January 2, 1962.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported in 405 Pennsylvania 546 (1962). The Opinion of the Chancellor in the lower Court has not been reported. The en banc Opinion of the Court of Common Pleas No. 6 is printed in 25 (Pennsylvania) District and County Reporter 2d 83. Copies of all these Opinions are attached to this Petition.

JURISDICTION.

There was no federal question in this case until December 5, 1961, when the Supreme Court of Pennsylvania filed its Opinion setting aside the Decree of the Chancellor as affirmed by the lower Court en banc. The decision of the Supreme Court violates the due process of law guaranteed by the 14th Amendment of the Constitution of the United States by setting aside the Decree of the Court below because of the alleged bias of the Chancellor towards the City, without allowing the petitioners a new trial before a new Chancellor. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED.

When a Chancellor finds as a fact that a municipal contract is null and void because the Administrator grossly abused his discretion in preferring one contractor over another, can the Supreme Court of Pennsylvania refuse to review the record to see if there was substantial evidence to support the aforesaid finding solely because it finds that the Chancellor was biased towards the municipality and further in such circumstances can the Decree of the Chancellor be set aside without the grant of a new trial before a new Chancellor?

STATEMENT.

Petitioners instituted suit in the Court of Common Pleas No. 6 of Philadelphia County to enjoin the awarding of a contract for municipal services without competitive bidding. The contention of the petitioners was twofold: First that the contract should be declared null and void

because it was not put out for public bids as required by the Home Rule Charter of the City of Philadelphia; Second, that the contract should be declared null and void because the overwhelming weight of the evidence showed that it was improperly negotiated and its award under all the circumstances was a gross abuse of administrative discretion.

The Supreme Court of Pennsylvania decided that the City Charter did not require public bidding and this phase of the case is not being made an issue in this Court. In reviewing the second contention, the Supreme Court of Pennsylvania refused to review the evidence to determine if there was substantial evidence to support the finding of the Chancellor in the Court of Common Pleas No. 6 that the contract was improperly negotiated and that its award was a gross abuse of administrative discretion. The Court en banc consisting of the Honorable Victor H. Blanc, Bernard Kelly and Joseph E. Gold had affirmed the decision of the Chancellor, President Judge Joseph E. Gold, in this aspect of the case. The Opinion of the Supreme Court of Pennsylvania states that the Court will not consider the finding that the contract was improperly negotiated and constituted a gross abuse of administrative discretion solely because the Supreme Court of Pennsylvania found that the Chancellor, Joseph E. Gold, was prejudiced toward the City of Philadelphia in his conduct of the trial. The Supreme Court of Pennsylvania therefore penalized the petitioners solely because of the alleged actions of Judge Gold and failed to consider whether there was sufficient evidence to substantiate the finding of the Chancellor even assuming that the Chancellor had some bias toward the City of Philadelphia. In refusing to consider the contention of petitioners that the contract was improperly negotiated and was a gross abuse of administrative discretion and in further failing to grant petitioners a new hearing before a new Chancellor, the Supreme Court of Pennsyl-

vania denied petitioners the due process of law afforded them by the 14th Amendment to the Constitution of the United States.

The City of Philadelphia, the respondent here never contended that Judge Gold was biased toward them until they filed their brief in the Supreme Court of Pennsylvania. They specifically did not raise this issue at any time in the hearing before the Chancellor nor at the time of the extensive argument before the Court en banc or in their Exceptions to the Chancellor's Adjudication.

The majority opinion of the Supreme Court of Pennsylvania reflecting the opinion of four Justices was filed December 5, 1961. A Dissenting Opinion reflecting the opinion of two Justices was filed December 5, 1961.

Petitioners filed a Petition for Reargument on December 11, 1961, and the said Petition was denied on January 2, 1962.

In Petitioners' Petition for Reargument in the Supreme Court of Pennsylvania, they raised the issue of violation of due process by the decision of the Court of December 5, 1961, in the following language:

> "The majority opinion reverses the finding of the lower Court that the contract in question was improperly negotiated, solely because of the alleged bias of the Trial Judge toward the City. Nowhere in the majority opinion did the Court consider whether or not the Record contained ample evidence to support the finding of the Trial Judge, regardless of any question of bias. Furthermore, it is unfair to the appellees and in violation of due process of law for the Court to reverse this finding of the Trial Judge, solely because of his alleged bias toward the City, without sending the matter back to the lower Court for a new hearing before a different Trial Judge."

REASONS FOR GRANTING THE WRIT.

This writ should be granted because the petitioners have been deprived of basic due process of law. The petitioners had no way of knowing the alleged bias of the Chancellor towards the City when they filed their suit. The petitioners had no choice of Chancellors. Furthermore, the City never raised the issue of the bias of the Chancellor in the trial nor in the exceptions it argued before the lower Court en banc. This issue was first raised in the Supreme Court of Pennsylvania. If such bias did exist, it was not the fault or responsibility of the petitioners and basic due process requires that petitioners be granted a new trial before a Chancellor free of bias.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ISIDOR OSTROFF,
OSTROFF, LAWLER & BAKER,
Attorneys for Petitioners.

Appendix.

ADJUDICATION OF THE COURT OF COMMON PLEAS NO. 6 OF PHILADELPHIA COUNTY.

GOLD, *P. J.*

I. PLEADINGS AND ISSUES.

Plaintiffs filed this complaint in equity, asserting that they are residents and taxpayers of the City of Philadelphia. They seek to enjoin the execution of an alleged illegal contract, dated December 30, 1960, between the City of Philadelphia and the Landfill Corporation of Pennsylvania, Inc. (hereinafter called "Landfill"). This contract gave the City the right to deposit on the Landfill site a maximum of 500,000 cubic yards of refuse from January 1, 1961 to December 31, 1961 in return for which the City agreed to pay Landfill $125,000. The complaint alleges that this contract is illegal because it was let to Landfill without the securing of competitive bids by the City which was in violation of the requirement of Section 8-200 of the Philadelphia Home Rule Charter of 1951 (hereinafter called "Charter").

The complaint also alleges that it is a requirement of Section 5-500(c) of the Charter that this contract be approved by the City Council, but said approval was never obtained.

The complaint alleges further that because said contract was negotiated privately with Landfill and Clearview Land Development Company (hereinafter called "Clearview") was not given an apportunity to bid, the City expended public funds far in excess of what it would have cost the City had there been competitive bidding.

No answer was filed by the City. Preliminary objections were filed by the City and dismissed by us. At the

hearing on plaintiff's motion for a preliminary injunction, the City orally answered the complaint by denying all averments. At the close of the hearing, it was stipulated by and between counsel for plaintiffs and the City, with the approval of the Chancellor that the hearing should be regarded as a final hearing.

II. Findings of Fact.

1. Plaintiffs are citizens, residents and taxpayers of the City of Philadelphia.

2. Defendant, City of Philadelphia, is a municipal corporation of the first class of the Commonwealth of Pennsylvania; defendants, Donald C. Wagner and David M. Smallwood, are respectively the City Managing Director and City Commissioner of Streets.

3. Clearview is a Pennsylvania corporation and operates a landfill site, pursuant to a permit granted by Darby Township in 1958, at a location bounded by Darby Creek, Avenue D and 80th Street, Darby Township, Delaware County, Pennsylvania, which is immediately adjacent to the City of Philadelphia.

4. Landfill, a Pennsylvania corporation formed in December, 1960, operates a landfill site in the Borough of Norwood, Pennsylvania.

5. John J. Buckley, is an engineer, a contractor, and the President of John J. Buckley, Inc., a Pennsylvania contracting firm.

6. Members of the Buckley family and firm are the stockholders, directors and officers of Landfill. John J. Buckley is not a stockholder, director, or officer of Landfill.

7. In 1960, the Philadelphia Streets Department became cognizant that it needed additional refuse disposal sites to handle collections of refuse for West Philadelphia in 1961.

8. In May, 1960, Clearview offered its facilities to the City pursuant to an advertisement requesting bids for such services. The City disqualified Clearview on the ground that it was not interested in obtaining the services of a landfill site but was considering disposal by water-borne transportation.

9. In January, 1960, Clearview offered its site to the Streets Commissioner as a site for disposal of the City's refuse.

10. In July, 1960, the Streets Commissioner talked with John J. Buckley concerning an area in the Borough of Norwood which later became the refuse disposal site of Landfill.

11. In July or August, 1960, the Streets Commissioner ordered a study made of the capabilities and economic feasibility of utilizing the Norwood site suggested by John J. Buckley.

12. On July 27, 1960, the Streets Commissioner informed John J. Buckley that the City of Philadelphia would offer a contract to use the Norwood sanitary landfill site if he could obtain a permit from the Borough of Norwood.

13. On October 28, 1960 and November 4, 1960, permits were issued to operate a sanitary landfill at the Norwood site by the Borough of Norwood to Andrew Augustine, Sr. On December 14, 1960, these permits were rewritten to add the names of John J. Buckley, Inc. and Landfill.

14. Andrew Augustine has been the foreman and superintendent of the Norwood site since January 1, 1961.

15. Andrew Augustine, Sr. operated a dump under the name of Hedley Corporation at Buckius Street and the Delaware River in Philadelphia from 1957 to 1960. This dump was closed by the City on January 31, 1960 because of numerous violations.

16. In July, 1960, Andrew Augustine, Sr. informed Abraham Michaels that he was going to be a partner with John J. Buckley in the operation of the Norwood site.

17. The original negotiations for the securing of the permit from the Borough of Norwood to operate a landfill were begun by Andrew Augustine, Sr.

18. The original negotiations to secure a negotiated contract with the City for utilization of the Norwood site as a disposal of refuse site were begun by Andrew Augustine, Sr.

19. An agreement was reached between the City of Philadelphia and John J. Buckley in November, 1960 for the use of the Norwood site.

20. A formal agreement was entered into between the City of Philadelphia and Landfill on December 30, 1960.

21. This agreement gives the City of Philadelphia the right to deposit up to 500,000 cubic yards of refuse on the Landfill site during the calendar year 1961, in exchange for which the City of Philadelphia is to pay $125,000 for the year to Landfill.

22. The agreement refers to Landfill and the City as the licensor and licensee, respectively. It also provides payments of $10,000 monthly payable on the first of each month.

23. Landfill is obligated to operate a sanitary landfill at the Norwood site and is to provide all required labor, equipment, watchmen, fire protection facilities, snow fences and all other necessary service and facilities.

24. This contract does not give the City of Philadelphia any right to possession of the Landfill site, but merely the right to deposit refuse thereon.

25. This contract requires that the Landfill site be available to the City of Philadelphia for depositing refuse twenty-four hours a day, seven days a week.

26. An Ordinance of the Borough of Norwood prohibits dumping of refuse at the Landfill site after 3:30 P. M. and on Sundays.

27. Prior to November 16, 1960, the Clearview landfill site was not in compliance with the regulations of the Department of Health of the State of Pennsylvania.

28. Clearview has employed the services of Major Russell W. Gies, a qualified sanitary engineer, since December 15, 1960.

29. As of December 31, 1960, for all practical purposes, Clearview was in compliance with the said health regulations. As of April 4, 1961, it was in full compliance.

30. Landfill does not employ the services of a sanitary engineer to supervise its operations.

31. During January and February, 1961, the one access road to the Landfill site was closed for several days because of inclement weather, and the City of Philadelphia was prevented from utilizing the site.

32. The City did not advertise for the submission of competitive bids prior to the letting of the contract for the use of the site operated by Landfill.

33. The refuse disposed of at the Landfill site by the City is collected from the West and Southwest Philadelphia areas.

34. The City trucks travel to the Landfill site via various routes, one of which passes the Clearview site on Buist Avenue.

35. The average additional mileage for a City refuse truck going from the West Philadelphia collection area to the Landfill site rather than to the Clearview site is 4.6 miles.

36. According to figures compiled by the Department of Streets of Philadelphia, as of 1958, it cost the City of Philadelphia 42¢ a mile to operate its collection trucks including the additional expenses of drivers, time, depreciation and engine maintenance.

37. The average extra costs incurred as a result of the use of the Landfill site for the West Philadelphia collection are substantial, and amount to approximately $40,000.

38. The Streets Department of Philadelphia conducted a survey to compare costs between using Clearview and Landfill prior to awarding the contract to Landfill, and the Streets Department knew that the Norwood site would be much more expensive than the Clearview site.

39. The Department of Streets did not obtain specific authorization from City Council prior to entering into the contract with Landfill.

40. In June, 1960, Streets Commissioner Smallwood advertised for competitive bids to be submitted for the disposition of refuse by water-borne transportation and the bids were received. However, after rebidding was obtained the plan for this type of refuse disposal was abandoned because the cost was prohibitive.

41. In the summer of 1960, Mayor Richardson Dilworth personally instructed Donald C. Wagner, Managing Director of the City of Philadelphia, and David M. Smallwood, Commissioner of Streets, not to enter into any contractual relationship with Clearview under any circumstances because of the Mayor's bias and prejudice against Clearview.

42. Although the bias and prejudice of the Mayor and the Managing Director in the summer of 1960 may have been justified, a subsequent inspection and examination of the Clearview site and of its operation, would have disclosed that the Clearview site should not have been de-

liberately ignored by the Streets Commissioner in November of 1960.

43. The Streets Commissioner well knew on December 30, 1960, when the Landfill contract was executed, that the Clearview site provided equal, if not better, facilities for the disposal of the City's refuse.

44. The Streets Commissioner well knew on December 30, 1960 that the Landfill contract would cost the City substantially more than a contract arrived at and awarded after competitive bidding to the lowest responsible bidder.

45. The Streets Commissioner well knew on December 30, 1960 that the contract with Landfill would cost the City substantially more than a contract negotiated with Clearview.

46. The Streets Commissioner was partial to Landfill and gave Landfill preferred and favored consideration not only in the choice of Landfill as a contracting party, but also in connection with the terms of the contract; specifically, by failing to include therein payment to Landfill of a set price for each cubic yard of refuse deposited at Landfill by the City.

III. Discussion.

The questions before the court are: (1) Was the Agreement between the City and Landfill for the disposal of refuse illegal in that it was negotiated without competitive bidding? (2) Was it necessary under Section 5-500(e) of the Charter for the City Council to have approved said contract between Landfill and the City? (3) If neither competitive bidding nor approval of City Council was required prior to the letting of said contract, did the executive officers of the City abuse their discretionary powers in letting said contract to Landfill?

We shall discuss these questions seriatum.

6

1. *Was the Agreement Between the City and Landfill for the Disposal of Refuse Illegal in That It Was Negotiated Without Competitive Bidding?*

We are convinced that the Charter requires that a contract for the use of a private landfill by the City be let only after competitive bids are secured and the lowest responsible bidder selected.

Our inquiry here must commence with the statutory provisions, including those of the Charter which govern the law of municipal contracts entered into by the City of Philadelphia.

The Charter provides on this subject in Section 8-200(1):

> "(1) Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, competitive bids *shall* be secured before any purchase, by contract or otherwise, is made *for the rendering of any services* and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder." (Emphasis added.)

The City contends first that Landfill renders no "service" to the City by merely providing a site for the disposal of its refuse. We think the City has not examined its own functions, one of which is the mandatory obligation to remove and dispose of refuse. See Section 5-500(c) of the Charter. The City, in disposing of refuse within its own limits, must no longer dump its refuse on a privately owned or city dump. It must comply with the rules and regulations of the Pennsylvania Department of Health, which, in short, provide for such sites to be operated as a landfill. Landfills are a legal operation; dumps are not. The difference between them is that only the landfill operation meets all of the State requirements to protect the health of our citizens and guards them from the danger of pestilence and air pollution.

By operating its site in Norwood, Pennsylvania, in compliance with the State health requirements, Landfill has made it possible for the City to "dispose" of a portion of its refuse, and were it not for the service rendered by Landfill, the City would have to more fully utilize its incinerators or operate the open lots owned by the City, as a landfill, and not as dumps. Presently, the city lots are being operated as dumps in violations of State law. Operating the city lots as a landfill would entail additional expenditures, which is partially avoided by the utilization of the Landfill site.

Paragraph 4 of the challenged contract provides:

> "4. Licensor shall operate a sanitary landfill in and upon the said premises, and to that end shall provide all required labor, equipment, watchmen, fire protection facilities, snow fences and all other necessary service and facilities."

Obviously, the City's obligation to "dispose" of its refuse, is being peformed by Landfill. Are we then to say that by performing one of the City's functions, Landfill is not "rendering any service" to the City? We think the mere posing of the question in this form provides the answer, which is that we must decide against the City's contention.

It is obvious to us that when one disposes of the City's refuse, he is doing that which the City is obligated to do and in this sense is rendering a service to the City such as makes necessary the awarding of bids through a competitive process to the lowest responsible bidder.

The City next contends that its agreement with Landfill is a lease and that under Section 8-200(3) of the Charter, such a lease being for a period not exceeding one year does not need the approval of a contract by the City Council. We cannot take this contention very seriously. Every lessee has certain rights in the leased premises, including the right to possession in and about the leased premises. The City

did not possess this right under its contract with Landfill. Every other attribute of a lease is also lacking. The contract between the City and Landfill refers to the City as the licensee and to Landfill as the licensor. We are of the belief that these terms directly designate the legal status of the City and of Landfill which does not mitigate against our position that Landfill was rendering a service to the City within the meaning of the phrase "rendering any service" as set forth in Section 8-200(1) of the Charter.

The City also contends that a sanitary landfill operation is a "unique" article within the meaning of Section 8-200(1) of the Charter. This is indeed a frivolous argument. A landfill is not an article, nor is it being purchased. There is nothing unique about a dump or landfill operation. The City operates five or six dumps within its boundaries. Private individuals also operate dumps within the City, and, at present, the City is under contract with at least two other operators of dumps for the disposal of its refuse.

The City's next contention is that under Section 8-200(1) of the City Charter a vacuum exists in the sense that, if the Landfill contract does not involve a service, unique article, or a lease, it does involve a license agreement which is not specifically referred to or encompassed within the language of Section 8-200(1) of the City Charter. Therefore, it follows, says the City, there is no existing legislation which makes it mandatory that this type of contract be competitively bid. We disagree.

Before analyzing the pertinent legislation which, in our judgment, controls this issue, let us first make a short statement concerning the policy of the City in its advocation.

We find it difficult to comprehend what good purpose would be served were the City's contention to prevail. Section 8-200(1) of the Charter was enacted for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best

work or supplies at the lowest price practicable. It was likewise enacted for the benefit of the taxpayers of Philadelphia and not for the benefit or enrichment of bidders, or those attempting to negotiate contracts with the City, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest."

To sustain the City here would open the door to the negotiation of contracts privately, with the result of bringing on the evils which this section of the Charter was designed to prevent. We consider it our duty to so construe and interpret the Charter so as to preclude any possibility of reverting to practices detrimental to the City's welfare, and in doing so, we are following well recognized authority, holding that such legislation must be strictly complied with in the matter of awarding municipal contracts, *Harris v. City of Philadelphia*, 299 Pa. 473 (1949). The legislative and municipal intent in the awarding of contracts is that there should be open and honest competition in order that fair prices should be secured and the City protected from collusive bidding as well as from favorite bidders. *Loucheim v. Philadelphia*, 218 Pa. 409 (1907). In the *Harris* case, the Supreme Court stated the following policy which the City should be supporting but unfortunately is attempting to disregard.

> "The infirmities of human nature, the natural disposition to favor friends, personal and political, and the various motives which influence public officers to depart from a strict and rigid adherence to the obligations that rest upon them as representing the public, make it important that they should be held strictly within the limits of the powers conferred upon them." (p. 479)

This concept of municipal ethics as stated by us should be continuously and rigidly upheld by the City; unfortunately, here it is not heeded. We therefore consider it

our duty to stop such usurpation of municipal power by applying the brakes inherent in our judicial authority.

As above stated, despite the fact that its duty is clear, the City doggedly contends that since the type of service rendered by Landfill is not a service within the contemplation of Section 8-200(1) of the Charter, there is no other existing legislation which makes it mandatory that this type of contract be competitively bid. We find no fault with the City's statement of the legal principle, we do criticize as woefully inadequate the City's research of existing legislation, which in our opinion controls the disposition of this case.

Our independent research leads us to the Act of May 23, 1874, P. L. 230, Section 6, 53 P. S. 1001, and the Act of June 25, 1919, P. L. 581, Article 20, Section 5, 53 P. S. 12675. (The City Charter of 1919.)

Why is this legislation important? Simply because the Charter provides in Article XI, Section 11-101:

> ". . . it is the intention of the electors in adopting this charter that it shall supersede all statutes or parts of statutes, local, special or general, and all ordinances of the City, affecting the organization, government and powers of the City to the extent that they are inconsistent or in conflict with this charter."

Section 6 of the Act of 1874 provides:

> ". . . all work and materials required by the city, shall be furnished, . . . *and all other kinds of work to be done for the city*, shall be performed under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance . . ." (Emphasis supplied.)

Section 5 of the Act of 1919, *supra*, provides:

> ". . . the collection of . . . rubbish . . . *within the limits of such city*, and the *disposal* of . . . rubbish . . . shall be done directly by the city: Provided,

> That any such *work* may be done by contract when authorized by the council . . . with the approval of the mayor. For the purpose of determining whether it is to the best interests of the city to authorize the performance of any such *work*, by contract, the mayor, or the council, may . . . invite bids for such work. . . ." (Emphasis supplied.)

We pause for a moment to scrutinize and analyze the vital language in Section 8-200(1) of the Charter, in Section 6 of the Act of 1874, and in Article XX, Section 5 of the City Charter of 1919. All three enactments call for bidding; in this sense they are not inconsistent or in conflict with one another. The Act of 1874 refers to, "all other kinds of work to be done for the city". The Act of 1919, uses the word "work" as synonymous with the "collection of . . . . rubbish . . . . within the limits of such city, and the disposal of . . . . rubbish." As to disposal, there is a clear implication that disposal be made outside of the city limits. What have we then? Clearly, under the Acts of 1874 and 1919, the "work" to be done by another in disposing of rubbish, under a contract with the City cannot be validated without competitive bidding.

As we analyze and construe the three legislative enactments: e.g., Section 8-200(1) of the Charter, the Act of 1874 and the Act of 1919, it is clear to us that Section 8-200(1) was enacted to cover the type of services provided by Landfill to the City. With respect to the disposal of refuse, there is no inconsistency or conflict between the Acts of 1874 and of 1919 and Section 8-200(1) of the Charter.

These legislative enactments complement each other; they do not conflict in any detail important to this discussion. It seems to us that when the framers of the Charter used the Acts of 1874 and 1919 as sources for the drafting of Section 8-200, and in doing so, placed therein the expression "rendering any services to the City," they meant gen-

erally the doing of work for the City, and specifically, the work involved in the disposal of refuse.

We find further support for our reasoning in the language of the Home Rule Act of 1949, Act of April 21, 1949, P. L. 665, Section 18, 53 P. S. 13101, and in Section A-110 of the Charter. The latter section provides:

> "The provisions of this Charter so far as they are the same as those of existing statutes or ordinances shall be construed as a continuation of such statutes or ordinances and *not as new enactments.*" (Emphasis supplied.)

We need not therefore speculate how far the Acts of 1874 and 1919 apply here. It is clear that they must be utilized with the result of complete repudiation of the City's contention that there is no legislative mandate for competitive bidding as applied to the type of contract we have under consideration. It is interesting to note that nowhere in the City Charter of 1919 is there any provision for competitive bidding before the City can contract with another for any purchase, work or service, except in Section 5 of Article XX, relating to the collection and disposal of rubbish, etc. It was put there for a specific purpose and this purpose is well known to those of our citizenry whose memory goes back to the days when refuse and garbage disposal contracts were the rewards of political power and the plums of administration cronies. To declare, as the City shortsightedly urges us to do, that Section 8-209(1) expressly repeals Article XX, Section 5 of the Act of 1919, or in the alternative, that the Act of 1874 and 1919 have no meaning here, is to revive the memory of a dismal and sordid era. This, we refuse to do.

It is therefore crystal clear to us that in the adoption of the Charter, the people of Philadelphia were closing, not opening, the door to those who would openly violate the civic commandment that competitive bidding must be inflexible.

As we have above adverted to, the City had made every conceivable contention to justify the Landfill contract. However, its final contention leaves us with a sense of frustration. It is simply this, that the present taxpayers have no claim to present this class action, simply because they are employed by Clearview. This uncivic contention must be likewise rejected. Every taxpayer has a right to enjoin the illegal expenditure of public funds, whether his individual loss would be great or small. Every taxpayer has the right to demand that the requirements of law, with respect to the method of letting municipal contracts, shall be complied with in the case of every contract, apart from the question of the immediate or direct loss that a failure to comply therewith may involve in any specific case. *Harris v. Philadelphia et al., supra; Glover v. Philadelphia et al.*, 304 Pa. 466 (1931); *Loewen v. Shapiro*, 389 Pa. 610 (1957); *Page v. King*, 285 Pa. 153 (1926).

We think that *Penn Galvanizing Co. v. Philadelphia*, 388 Pa. 370 (1957), cited by the City is inapplicable here. There plaintiff sought to invalidate the action of the Tax Review Board of the City, granting relief to certain designated users of water supplied by the City. Here, our Supreme Court held that the action instituted by the plaintiff was not a class action, was not titled as such, and could not operate as a class or taxpayers' action under the intimate facts of that case.

We therefore conclude that plaintiffs have the standing to maintain this taxpayers' suit in equity.

The attitude of our courts on the question of competitive bidding may be gleaned from *Smith v. Philadelphia*, 227 Pa. 423, 430, 431 (1910), in which the court stated:

> "In awarding contracts, the officers of the City must comply strictly with the requirements of the statutes and ordinances. These provisions cannot be evaded or disregarded by the city or its officials. The protection of the public as well as the rights of the contractor require their rigid enforcement."

This rule has been cited with approval in *Harris v. Philadelphia*, 299 Pa. 473 (1930), and in later lower court decisions: *Dickinson et ux. v. City of Philadelphia*, 73 D. & C. 523 (1951); *Ray Klump, Inc. v. Borough of Ephrata*, 18 D. & C. 2d 61 (1958).

The most strict applications of the rule requiring competitive bidding were in *Philadelphia Company v. City of Pittsburgh*, 253 Pa. 147 (1916); and *Loucheim v. Philadelphia, supra.* In the former, it was held that a contract to supply gas to the city hospital was void because it was awarded without competitive bidding, despite the fact that the other companies furnishing such service would have had to lay additional pipe lines for some distance. In the latter case, after bids were received on a contract for filter materials, the City engaged in private negotiations with one of the bidders and his bid was modified so that he became, in fact, the lowest bidder. The awarding of the contract was held invalid, the court being of the opinion that the proper method would have been to set aside all the bids and secure other competitive bids.

2. *Was It Necessary Under Section 5-500(c) of the Charter for the City Council to Have Approved Said Contract Between Landfill and the City?*

Section 5-500(c) of the Charter provides:

"(c) Sanitation. The Department shall itself, or when specifically authorized by the Council, by contract, clean and sand City streets, remove and dispose of ashes, garbage and refuse, remove and dispose of ice and snow from City streets, design, construct, repair, maintain and operate incinerators or other plants or equipment for the disposition of ashes, garbage and refuse, and administer and enforce statutes, ordinances and regulations for maintaining the cleanliness of City streets."

The significant part of this Section from the standpoint of the question before us is:

> "The Department shall itself, or when specifically authorized by the Council, by contract, . . . remove and dispose of . . . refuse. . . ."

It is apparent that the City itself is burdened with the mandatory task of keeping its streets sanitary, except when authorized by Council to have others perform the task by contract. We interpret this to mean that whenever Council so authorizes the Department of Streets, it may contract with a private firm to perform either the removal or disposal of refuse, or both.

We believe that the utilization of a private landfill operation can only be resorted to when Council specifically authorizes the Streets Department to enter into such a contract.

We think that, when the City wishes to deposit refuse on a private landfill, such services may be obtained by contract only after specific authority is given by City Council. The City, in the instant case, hauls its refuse in its own trucks to the private landfill and deposits it there. Then Landfill disposes of the refuse by covering it with fill. Under these circumstances, the City is removing the refuse from the streets with its own facilities and equipment, but Landfill is providing the disposal facilities. It is our judgment, therefore, that such a contract to use a private dump or landfill must be specifically authorized by City Council. In view of the fact that this mandatory requirement of the Charter has not been complied with in our case, we hold that the contract between the City and Landfill is illegal and void.

3. *If Neither Competitive Bidding Nor Approval of City Council Was Required Prior to the Letting of Said Contract, Did the Executive Officers of the City Abuse Their Discretionary Powers in Letting Said Contract to Landfill?*

Assuming, arguendo, that neither competitive bidding nor specific authorization by City Council were required prior to the award of the instant contract by the City to Landfill, our opinion as to its illegality remains unchanged. We feel that the Streets Commissioner, who privately negotiated the Landfill contract, abused his sound discretion.

We are cognizant that it is not our function to unduly interfere with the letting of City contracts. We should afford redress only when we are satisfied the City will, in some way, suffer, either through fraud, bad faith, capricious and arbitrary action, or abuse of power. The delegated powers of our officials are deliberative and discretionary, and, when there is an absence of the above considerations in their exercise, we should not invalidate a contract that has been awarded after thorough inquiry: *Wilson v. New Castle City*, 301 Pa. 358 (1930); *Schenck v. Pittsburgh*, 364 Pa. 31 (1950); *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566 (1954); *Flaersheim Appeal*, 348 Pa. 98 (1943); *Woodward v. Philadelphia*, 333 Pa. 80 (1938); *Parker v. Philadelphia*, 391 Pa. 242 (1958); *Lazrow v. Philadelphia Housing Authority*, 375 Pa. 586 (1954).

The burden was upon plaintiff taxpayers in this action to show that the Streets Commissioner abused his discretion in negotiating this contract to Landfill. We believe they have, more than adequately, met their burden.

In the early part of 1960, the Streets Department of the City was aware of the need for landfill or dump sites located outside the City to accommodate the growing population and the expanding economy of the City. There was also an awareness of the unhealthful conditions resulting from the operations of dumps within the City, by both the

City and by private operators. In the year of 1949, a special report had been prepared by the firm of Metcalfe Co. indicating that the City's disposal of refuse was a problem which would be aggravated in later years. The City incinerators cannot accommodate the tonnage of refuse to be disposed of. Dumps operated under unsanitary conditions were and are a health menace. The City operates five or more dumps today, and does not even make a pretense of operating the same as sanitary landfills. The City dumps today do not meet the requirements of a sanitary landfill as promulgated by the Pennsylvania Department of Health.

Prior to 1960, two of the key violators of the State health regulations were Clearfield and the Hedley dump, operated by one Andrew Augustine, Sr. Clearview is located in Delaware County, being directly adjacent to the City line. The land of Clearview abuts the land in the Eastwick area of Philadelphia, recently condemned by the Redevelopment Authority of Philadelphia.

To understand the background of the City's bias against Clearview, we retrace our steps for a few years prior to 1960 when the inhabitants of Eastwick, adjoining the Clearview dump, complained of the methods used by Clearview in the operation of its dump. The swampy area which abuts one end of the Clearview tract is City land. Now it has been vacated by the residents of Eastwick whose properties were condemned by the Redevelopment Authority. It breeds flies, mosquitoes, and rodents. Unfortunately, the City never built sewers in that area. Cesspools and septic tanks were commonly used. As a result of leakages in such disposal units and because the Eastwick land is higher than the Clearview area, the leakage would drift into the Clearview area and make matters more miserable for the Eastwick residents. Matters were not helped any by the Clearview trucks straying some of its collected refuse and garbage over the Eastwick section of Philadelphia.

These unsanitary conditions came to the attention of the City officials who vented their wrath in oral imprecations against Clearview with no resultant benefit to the citizens of Eastwick. Finally, by direct order of the Managing Director of the City, a barricade was constructed, designed to prevent Clearview from running its trucks over the streets of Philadelphia. This barricade was ordered removed by our colleague, Chudoff, J. of the Court of Common Pleas No. 1. In the meantime, the record is clear that the Pennsylvania Department of Health forced Clearview to take such sanitation measures in 1960, so that at the end of that year, it was in substantial compliance with the State's sanitary landfill regulations. As of April 4, 1961, it was in full compliance. So much for Clearview.

Augustine, the operator of the Hedley dump within the City limits, was cited forty-four times by the City authorities but nevertheless managed to keep his illegal dump site open for several years until it became obvious even to him that the end of such operation was in sight. He therefore made efforts to procure the Landfill site as the first step of his plan to negotiate a contract with the City for its use.

On January 12, 1960, Clearview, by its attorney, James F. Lawler, indicated to the Streets Commissioner that it was interested in providing sites for Philadelphia to dispose of its refuse. In the spring of 1960, the Streets Department had ventured into the field of water-borne transportation of refuse, even going to the extent of having prospective bidders qualify. Both Clearview and Augustine were disqualified. It had a special appropriation of $200,000 to spend for this purpose. When the bids came in, on June 23, 1960, the amounts thereof were so high that the project had to be abandoned.

We now come to a period about July of 1960. This was the situation. The City needed landfill sites desperately but under direct orders of the Mayor, transmitted to the Streets Commissioner by the Managing Director, the Streets Commissioner refused to negotiate with Clearview,

or even to consider the Clearview site. Abraham Michaels, Deputy Commissioner of Streets, in charge of its Sanitation Division, had begun to negotiate, not later than May 20, 1960, with Augustine for the Norwood site fully aware of Augustine's bad record of violations. Mr. Michaels prepared a report dated August 16, 1960. It deals comprehensively with the refuse disposal problem. It pointed out the need for more disposal sites outside the City limits. Nowhere does it mention Clearview or the fact that Clearview had a site available, a fact also well known to Mr. Michaels. With respect to Augustine, the man who had been a problem child to the City's enforcement officers since 1957, Michaels' report indicates that the Department had been negotiating for some time with Augustine for the Norwood site and that the Department expects to enter into a contract shortly with Augustine for the Norwood site. Despite testimony by the Streets Commissioner that John J. Buckley was in touch with him in July, 1960, regarding the City's utilization of the Norwood tract, the report of Mr. Michaels makes no mention of John J. Buckley in this connection, a significant omission. To give the picture a brighter color, John Buckley, long on intimate terms with the Streets Commissioner, and head of a construction company which has had extensive contractual dealings with the City (who had no prior experience in operating a sanitary landfill) negotiated the Landfill contract with the City, taking over so to speak, the negotiations begun by Augustine. Thus, the City could not be charged with negotiating with Augustine whose unsavory record as a dump operator has been referred to.

Late in October, 1960, Mr. Buckley and Mr. Augustine secured a permit from the Borough of Norwood to operate a sanitary landfill.

On December 30, 1960, the contract between Landfill and the City was executed, effective for one year commencing January 1, 1961. The officials of the Department of Streets then knew that the access road from the Borough

of Norwood to Landfill was in terrible condition and would be impassable in the event of inclement weather. They knew of the superior accessibility and facilities afforded by Clearview directly across the county line. They also knew that the Eastwick section had been depopulated by the accelerated program of the Redevelopment Authority and that the complaints against Clearview had been reduced to de minimis. They also knew that no fraud could be practiced against the City in the calculation of gross cubic yards disposed of by the City, for such calculations could only be made by the Department of Streets. It had every good reason to conclude that a contract with Clearview would cost the City substantially less than under the contract eventually negotiated with Landfill. It knew of the requirement for competitive bidding, such knowledge coming from its call for bids only several months prior when it considered the feasability of disposing of refuse by water-borne transportation. But the ban had been placed upon Clearview, so no matter that the City was not getting the best value for its money (which we shall show), and no matter that the Landfill contract reeked of favoritism, the City officials nevertheless speedily approved the contract for the Norwood site.

We are, therefore, confronted with an interesting question of law relating to administrative discretion. Assuming, arguendo, that the bias and prejudice of the Mayor, the Managing Director and the Commissioner of Streets against Clearview were justified prior to December 30, 1960, did the administration abuse its discretion in ignoring the landfill site of Clearview on the sole basis of such prejudice and bias against Clearview where the evidence is clear that not only could Clearview have provided the same facilities as Landfill, if not better, but also that the over-all cost to the City would have been appreciably less if the Clearview site had been selected. One of the factors in the calculation of such increase is that the round trip from collection

points in Southwest Philadelphia to the site at Landfill averages 4.6 miles more than the same trip to Clearview.

As we have already stated, the City was not wholly unjustified in their dissatisfaction with Clearview. However, as of December 30, 1960, Clearview had substantially complied with the standards of the Pennsylvania Department of Health and it is clear from the evidence, that had the City made an inspection of Clearview at the time it negotiated the contract with Landfill, it would have found a landfill operation which would have partially, and probably completely, met its disposal needs for 1961. *We think the administration has permitted its bias and prejudice to override its duty to the people of Philadelphia resulting in a much more costlier contract, and, as a consequence, the City and its taxpayers are made to suffer.*

The rule of law in this State relating to the discretion of municipal executives is well settled. Our Supreme Court stated in *Hibbs v. Arensberg*, 276 Pa. 24 (1923), at p. 26:

> "Executive officers of municipal and school districts are clothed with the responsibility of originating and executing plans for the public good, the presumption is that their acts are on such considerations and their decisions reached in a legal way after investigation. When their actions are challenged, the burden of showing the contrary rests on those asserting it, and it is a heavy burden. Courts can and will interfere only when it is made apparent this discretion has been abused. Abuse of discretion does not, as a rule, come from unwise acts or mistaken judgment, but generally springs from improper influences, a disregard of duty, or a violation of law."

Our Supreme Court has followed this rule again and again to determine whether municipal or school district executive officers have abused their discretion: *Hiorth v. Chester City*, 282 Pa. 387 (1925); *Campbell v. Bellevue Borough School*

District, 328 Pa. 197 (1937); *McIntosh Road Materials Co. v. Woolworth, Secretary of Property and Supplies*, 365 Pa. 190 (1950); see also: *Blatstein v. City of Philadelphia*, 5 D. & C. 2d 385 (1955).

We think the Streets Commissioner abused his discretion in letting the instant contract to Landfill without considering the facilities of Clearview. We are fortified in our conclusion not only because substantial sums of money have been misspent, but also by the evidence which points to capricious and arbitrary action, and an abuse of power; i.e., favoritism practiced by the Streets Commissioner. Let us see.

The principal owner of the equity interest of the Buckley Construction Company is John J. Buckley, a contractor with whom the Department of Streets has had considerable business dealings. He testified that Augustine was only a superintendent or manager of Landfill; that his salary is $150 per week; that Augustine owns no stock in Landfill; that the entire stock is owned by his son, Robert Buckley, and other members of the Buckley family. The original idea of the Norwood site was Augustine's. It was his original negotiations which secured both the permit from the Borough of Norwood and the contract from the City. He needed a respectable front knowing that he was persona non grata to the City. We doubt the credibility of this testimony in view of the enormous profits coming to Landfill under its contract with the City. The City pays Landfill $125,000 per year for the privilege of depositing a maximum of 500,000 cubic yards of refuse. The price per year is a fixed sum and must be paid regardless of the amount of refuse deposited on Landfill's site. It is interesting to note that the instant contract with Landfill is the only contract of its kind under which the City does not pay a fixed rate for each cubic yard of refuse deposited.

It is also interesting to note the results obtained thus far by the City under its contract with Landfill and what may be reasonably expected for the balance of the life of

this contract. The evidence shows that the City disposes of rubbish throughout the year on the basis of 250 working days; for the first 59 working days, to April 4, 1961, the City disposed of 59,800 cubic yards of refuse at Landfill (this amounts to 1,000 cubic yards of refuse per day). At the hearing, we developed the fact that weather conditions were inclement during the months of January and February, 1961. In response to our question, the Streets Commissioner stated that 1,200 cubic yards of refuse per day had been disposed of on the Landfill site for the three weeks prior to April 4, 1961 when weather conditions were more favorable. Because there are only 191 working days remaining under the instant contract, remembering that only approximately 60,000 cubic yards of refuse have been deposited on the Landfill site as of April 4, 1961, we visualize the picture to be as follows: there are remaining 440,000 cubic yards of refuse to be deposited by the City at Landfill under this contract during the 191 working days remaining after April 4, 1961. If the 440,000 cubic yards are not deposited by the end of 1961, it is obvious that the City is not obtaining the full benefits under the Landfill contract to which it is entitled. Add to this the fact that because refuse collections by the City decrease by at least 15% during the period from May 15th through October 1st, the picture becomes all the more grave. Eliminating the factor of the decreased refuse collections between May 15th and October 1, 1961, the City will be required to dispose of approximately 2,500 cubic yards of refuse per day in order to obtain the full benefits under its contract with Landfill. Nor do we take into consideration the fact that inclement weather in the coming winter months of 1961 may also impede or even prevent the City from ingress to the Landfill site. This may very well occur for this is exactly what happened in January and February of 1961, when ingress and egress to the Landfill site was prevented for a period of at least ten days due to impassibility of the access road to the site.

This possibility of severe loss of public funds, caused us to state from the bench to the Streets Commissioner, that, acting in our capacity as a citizen and taxpayer, we demanded and expected the City to receive full value for every dollar spent by the City on the Landfill contract. At the time of the hearings, it appeared doubtful to us whether the City would dispose of 250,000 cubic yards of refuse at the Norwood site during 1961 for the reasons we have assigned. We were assured that the City intends to close the Bartram incinerator in the fall of 1961, and that the refuse usually disposed of at this incinerator would be sent to the Norwood site. Thus, it is intended that by action late in 1961, the City will get its money's worth.

There is other evidence concerning the surrounding circumstances of the letting of this contract which cause us to be concerned. Mr. John J. Buckley wrote a letter to the Department of Streets in which he indicated that the entire resources of the Buckley firm would guarantee performance by Landfill of its contract with the City. Thus far, the Buckley firm has not been called upon nor is there anything to indicate that it will ever be called upon, to honor its guarantee. Mathematically, as we stated, it appeared that the City would deposit only 250,000 cubic yards of refuse on the Landfill site in 1961 unless the Bartram incinerator shut down removes what is now an obvious inequity and loss to the City under the Landfill contract. Otherwise, the City will be required to pay $250,000 over a two-year period, for the disposal of 500,000 cubic yards of refuse.

Why the City did not provide a set price per cubic yard in its contract with Landfill, perplexes us. The contract passed the scrutiny of the Streets Department, the Managing Director, the Finance Director, and the City Solicitor. We think the answer may be found in the manner and circumstances of its negotiation. The Borough of Norwood permit to both Messrs. Augustine and Buckley was dated October 28, 1960. Thereafter, this tailor-made contract

was given such expeditious treatment as is rarely seen in any administration. Mr. Ralston, an engineer for the Department, wrote his report on November 5, 1960. Mr. Buckley made his offer in writing to the Department on November 9, 1960 after the negotiations were concluded on November 7, 1961. Approval was speedily given by the Managing Director and the City Solicitor. It was approved by the Finance Director on November 16, 1960.

Mr. Ralston, who recently left the City's employ, testified with reference to costs that on the basis of 1958 figures, the City is required to expend additionally a minimum of $16,000 and a maximum of $48,300 to annually utilize the Landfill site rather than the Clearview site. On the other hand, Mr. Michaels testified that the extra annual costs to the City, based upon the same 1958 figures, is a minimum of $8,395 and a maximum of $26,065 for the entire year of 1961. It is to be noted that these figures do not include the increased cost of labor and of maintenance since 1958.

We do not deem it important to decide whether we should accept the figures of Mr. Ralston or Mr. Michaels. What is important is that the Streets Commissioner knew well that the letting of this contract to Landfill would cost the City a substantial sum of money in excess of what a similar contract with Clearview would have cost. We fail to find any legal justification on the part of the City, through its Streets Commissioner, in refusing to even consider the Clearview site nor do we consider his acts as only a mistake in judgment.

Considered but ignored, in the administration's hurried negotiations with Landfill, were the following important elements, all of which add up to arbitrary and capricious abuse of discretion.

a) The lower cost to the City if there had been competitive bidding, at least $35,000. We find a genuine abuse of power in the fact that only a short time prior to negotiating the Landfill contract, the City did advertise for disposal

of refuse by water-borne transportation. In our judgment, there is no difference between the two types of disposal. In each case, the low bidder would have rendered the same basic service to the City.

b) The extra cost caused by a longer haul, which conservatively should amount to $40,000 annually, excluding extra wear and tear to the City's motorized trash vehicles.

c) Assuming the closing down of the Bartram incinerator, this will cause all of the area's trash to be transported to Norwood after September, 1961. How much more this will cost the City in extra labor and mileage we do not know because no figures were given to us but our insight tells us the losses will be of a substantial nature.

d) The access road to Norwood is a small two lane country road which is impassable in the event of snow or ice on the ground. How much this will mean in overtime to the City's labor force is another intangible in this case. In this connection, we note that the Norwood Borough ordinance prohibits dumping after 3:30 P. M. whereas there is no such restriction at Clearview.

In connection with the element of favoritism to Landfill, it is interesting to note that Landfill started with an initial capital of $1,000 from which organizational expenses had to be paid. It then borrowed $2,500 for operational expenses. If the truth be known, it is operating on capital supplied by the City for the contract provides that the $10,000 monthly installments are to be paid on the first of every month. On this nominal investment, it stands to earn a gross minimum profit of $70,000, assuming that its capital expenses are depreciated over a period of more than one year. We are not concerned with the inordinate and exorbitant profit being made by Landfill. This is not our affair, but when we choose to call this contract "order or tailor-made", we do so to indicate that bias and prejudice to

one, when contracts are being negotiated, result in preference and favoritism to another.

In view of what we have stated, we think it is our duty to declare the City's contract with Landfill invalid because the City's action was based not on ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, but upon a deliberate overreaching of its powers. In doing so, we think the Streets Commissioner acted arbitrarily and abused his discretion.

IV. Conclusions of Law.

1. The contract to Landfill on December 30, 1960, for the depositing of refuse by the City on the Landfill site was not executed in accordance with the provisions of the Act of May 23, 1874, the Act of June 25, 1919 and Section 8-200 (1) of the Philadelphia Home Rule Charter, which require competitive bidding prior to the letting of such contracts.

2. The agreement between the City of Philadelphia and Landfill is a contract for services to be rendered to the City for one year.

3. The contract between Landfill and the City was executed without the specific authorization and approval of the City Council as required by Section 5-500(c) of the Philadelphia Home Rule Charter.

4. The Streets Commissioner of the City abused his discretion in awarding the contract to Landfill.

5. The Streets Commissioner arbitrarily and capriciously refused to consider the Clearview site in letting this contract to Landfill, and in such refusal, committed an abuse of power by practicing favoritism to Landfill.

6. The contract entered into by the City of Philadelphia and Landfill is null and void.

7. An injunction should issue restraining the City from compliance with the Landfill contract.

8. Plaintiffs are taxpayers resident in the City and have the right to institute this taxpayers' suit in equity.

DECREE NISI.

AND NOW, to wit, this 1st day of June, 1961, upon consideration of the pleadings, testimony, and briefs filed in the above-captioned proceeding, it is hereby ordered, adjudged and decreed:

a) The contract between the City of Philadelphia and the Landfill Corporation of Pennsylvania, Inc., dated December 30, 1960, is null and void.

b) The City of Philadelphia, Donald C. Wagner, the Managing Director, David M. Smallwood, the Streets Commissioner, and their agents, servants, and employees are enjoined and restrained from using the services of the Landfill Corporation of Pennsylvania, Inc. pursuant to the aforementioned contract.

c) The City of Philadelphia, Donald C. Wagner, the Managing Director, David M. Smallwood, the Streets Commissioner, and their agents, servants, and employees are enjoined and restrained from contracting for disposal services for ashes and refuse unless such disposal services are obtained after competitive bidding in accordance with the Philadelphia Home Rule Charter, Section 8-200 (1951).

d) Costs to be paid by the City of Philadelphia.

By THE COURT:

/s/ GOLD,
P. J.

OPINION OF THE COURT OF COMMON PLEAS NO. 6 OF PHILADELPHIA COUNTY SUR EXCEPTIONS TO ADJUDICATION.

BLANC, *J.*

This complaint in equity was filed by plaintiffs, each of whom is a resident and taxpayer of the City of Philadelphia, (City), against the City, its Streets Commissioner, David M. Smallwood, (Smallwood), and its Managing Director, Donald C. Wagner, (Wagner). Plaintiffs sought to enjoin the execution of an alleged invalid contract between the City and the Landfill Corporation of Pennsylvania, Inc., (Landfill). This contract, dated December 30, 1960, in essence provided that the City should pay Landfill $125,000 during 1961 for the privilege of disposing of 500,000 cubic yards of trash and rubbish on the site of Landfill in Norwood, Pennsylvania. Plaintiffs asserted that the contract for refuse disposal was illegal and invalid for the following reasons: (1) it was awarded without competitive bidding, which they allege is the requirement of Section 8-200 of the Philadelphia Home Rule Charter of 1951, (Charter); (2) it was awarded without approval of the City Council, which they allege is the requirement of Section 5-500(c) of the Charter; and (3) in the alternative, if the Charter did not require competitive bidding and approval by City Council, Smallwood abused his discretion in awarding the contract to Landfill without negotiating with Clearview Land Development Company, (Clearview) because of his bias and prejudice against Clearview and his preference for Landfill. After hearing, the Chancellor filed an adjudication sustaining all of plaintiffs' contentions. Defendants filed exceptions to the Chancellor's findings of fact, conclusions of law and decree nisi which were argued before this court en banc and which are now before us.

These exceptions fall within the following four categories:

1. The Chancellor made findings of fact which were not supported by the evidence.

2. The Chancellor refused to make findings of fact as requested by the defendants.

3. The Chancellor refused to adopt the conclusions of law requested by defendants.

4. Exceptions to the decree nisi.

The bone and sinew of the City's attack on the Chancellor's adjudication is to be found in the third category of exceptions. It challenges the Chancellor's view that the negotiated contract was invalid because it was executed in violation of Sections 2-800 and 5-500 of the Charter. In essence, the City contends that Landfill rendered no services to the City under this contract; therefore, it claims that these sections of the Charter are inapplicable.

Without alluding to the reasons cited by the Chancellor, we share his viewpoint that the contract between the City and Landfill was one for services. By the very terms of the agreement, Landfill was bound to render services to the City. Likewise, we emphasize the view of the Chancellor that the instant litigation concerns one of the most vital and important sections of the Charter. We refer, of course, to Section 8-200 which calls for competitive bidding and the selection of the lowest responsible bidder in the letting of certain City contracts. As the Chancellor so ably pointed out, this section is not new, nor is it a novel enactment of public policy. It continued the mandate of the Acts of May 23, 1874, P. L. 230, section 6, 53 P. S. 1001, and of June 25, 1919, P. L. 581, Article XX, Section 5, 53 P. S. 12675 (The City Charter of 1919), that competition must be the pole star in the City's firmament in order to guard against favoritism, extravagance, fraud and corruption in the awarding of municipal contracts. We agree with the Chancellor that our judicial efforts should be directed to con-

strue the pertinent legislation so that, as an end result, negotiated contracts will henceforth bear the City's disapproval, and not its encouragement. We need not refer to numerous authorities cited by the Chancellor in his adjudication to buttress our viewpoint that the public interest should prevail in cases where there is a conflict between the convenience of the City's contractual practices as opposed to the public interest. We deem it sufficient to cite the most recent decision of our Supreme Court in *Patterson, Appellant v. Delaware County*, 404 Pa. 5 (1961) where the mandate of competitive bidding was enforced even in the bizarre situation where the contractor was innocently beguiled into a loss contract, it being undisputed that the township and the contractor acted in good faith. In this case, the Supreme Court reaffirmed the mandate for competitive bidding in this terse language, at page 7: "It (The Township Act) was passed to prevent fraud. Sometimes, as in this case, it works a gross injustice, but it cannot be evaded, ignored, nullified or rewritten by a court."

As we stated during the argument of this case, the City is, policywise, on the wrong side of the fence. It is here attempting to justify a privately negotiated contract, being well aware that should its efforts succeed, the results would be the creation of a rent in the civic and fiscal fabric of the Charter which, once opened, could be widened by subsequent administrative edict or councilmanic enactment. If its viewpoint is to receive judicial sanction, henceforth, all work done for the City, and specifically defined or interpreted by the City's executive or legislative officers not to be "for construction, alterations, repairs or maintenance or for rendering any services to the City" could be awarded through the medium of a privately negotiated contract. To pose the question is to supply its answer. We shall and will not, by sustaining the City's viewpoint, open the door that inevitably leads to the evils which this section of the Charter was specifically enacted to prevent and prohibit.

In its able brief, the City does not challenge the Chancellor's opinion that Section 8-200 of the Charter, Section

6 of the Act of 1874, Article XX, Section 5 of the Act of 1919, Section A-110 (Appendix) of the Charter and Section 11-101 of Article XI of the Charter must be considered and construed together in order to ascertain that which he has considered to be the true intent of the framers of the Charter; i.e., the mandate for competitive bidding and the award to the lowest responsible bidder cannot be evaded or avoided by administrative fiat. The City, on this vital issue, contends (see page 14 of its brief) that competitive bidding "is not possible" in the acquisition of landfill sites, and it attempts to support its position by showing the problems the City would encounter were it forced to utilize the competitive process in letting such contracts.

There are two good and sufficient answers to this contention. First, the mandate of the Charter cannot be avoided because of administrative expediency. If negotiated contracts are substituted for an award to the lowest responsible bidder, there could never be any determination that the work is being done or the services rendered at the lowest cost to the City. Second, should experience show that the City's health and welfare program or its relationship to adjoining communities are being prejudiced or adversely affected by the failure to use the negotiated process for landfill operations, the Charter could be amended to allow such practice by resorting to the simple and expeditious amendatory method provided for in the Home Rule Act of 1949.

We also disagree with defendants' contention that Article XX, Section 5 of the Act of 1919 does not contain any mandatory requirement as to competitive bidding. We conclude that the word "may" as used therein refers to those who may invite the bids for such work; i.e., either the Mayor or the City Council. We are of the opinion that this provision for competitive bidding to award a contract for the disposal of rubbish is mandatory whether the contract is awarded by the Mayor or the City Council.

With respect to defendants' contention that the instant contract was not required by the Charter to be specifically

approved by City Council, our judgment inclines us to follow the Chancellor's holding that this contract was one which specifically required such express approval. Nor do we think that the approval by City Council for the transfer of funds in the budget for this contract was sufficient to comply with Section 5-500(c) of the Charter.

Finally, we think defendants' contention that Smallwood did not abuse his discretion is without merit. As the Chancellor pointed out in his adjudication, Smallwood abused his discretionary powers on the basis of evidence which revealed favoritism to Landfill and bias against Clearview, to the City's fiscal detriment. The City makes much of the fact that on December 30, 1960, when it awarded the negotiated contract to Landfill, Clearview then was not in strict compliance with the regulations of the Pennsylvania Department of Health relating to sanitary landfills. Neither was Landfill, which was then only a corporate shell. This is not the issue here. The City knew of the superior accessability and facilities of Clearview. It could have prescribed, as a condition for the qualification of bidders, that such bidder comply with the State health regulations. Such a clause was included in the Landfill contract, and could have been as readily incorporated in the qualification part of the bids. The City's position is undermined by its previous action in asking for bids to dispose of rubbish by water-borne transportation in May and June of 1960. We perceive no fundamental difference in the two methods of rubbish disposal. This further convinces us that the contract with Landfill was awarded to a person who had no prior experience with landfill operations with two prime objectives in mind: first, that under no circumstances would Smallwood do any business with Clearview and, second, he favored Landfill, a fact which is obvious from the type of preferred contract awarded to Landfill. As the Chancellor indicated, Smallwood's bias against Clearview may have been justified; but this does not, in our judgment, give him the right to substitute bias, prejudice and favorit-

ism in the place of an unemotional and fiscally responsible attitude. This was not an unwise act or a case of mistaken judgment. The obvious failure to call for bids was the direct result of Smallwood's determination to bypass Clearview and to take any and every step which would insure the end result of deliberately eliminating Clearview from the picture. The Chancellor has held in this context, that Smallwood violated not only his duty to the City and to its citizens, but also violated the applicable legislation. *Hibbs v. Arensberg*, 276 Pa. 24 (1923). After reviewing the record of this case, we agree with the Chancellor's finding of abuse of discretion on the part of the City Streets Commissioner.

With reference to the first category of exceptions, we find some justification for defendants' contention, and, therefore, we have amended the following findings of fact to read as follows:

8. In May, 1960, Clearview offered its facilities to the City pursuant to an advertisement requesting the submission of qualification questionnaires for such services. The City disqualified Clearview on the ground that it was not interested in obtaining the services of a landfill site but was considering disposal by water-borne transportation.

13. On October 28, 1960 and on November 4, 1960, permits were issued to operate a sanitary landfill at the Norwood site by the Borough of Norwood to Landfill, Buckley and Company, Inc., and Andrew Augustine, Sr. On December 14, 1960, these permits were rewritten to include only Landfill on the permit, and they were given to Andrew Augustine, Sr.

22. The agreement refers to Landfill and the City as the licensor and licensee, respectively. It also provides for monthly payments of $10,416.66, payable on the first day of each month.

33. The refuse disposed of at the Landfill site by the City is collected from the West Philadelphia area.

35. The average additional round trip mileage for a City refuse truck going from the West Philadelphia collection area to the Landfill site rather than to the Clearview site is 4.6 miles.

37. The average extra costs incurred and to be incurred during 1961 as a result of the use of the Landfill site for the West Philadelphia collection are substantial and could range as high as $40,000, depending on the amount of overtime payments to truck drivers and assistants and the number of stops and starts by the trucks on each trip.

38. Smallwood never conducted any survey to compare costs between using Clearview and Landfill prior to awarding the contract to Landfill, but he was aware that it would cost the City substantially more to use the Norwood site rather than the Clearview site.

With reference to the second category of exceptions, we are well aware that the Chancellor's duty does not require him to adopt the language of either plaintiffs' or defendants' requests for findings of fact, nor is he required to separately answer each of their requests for findings of fact and conclusions of law. On the contrary, he may make his own findings of fact and state his conclusions of law in his own language: *Sweigert v. Burkholder, et al.*, 154 Pa. Super. 424 (1943).

Nevertheless, upon reconsideration and review of defendants' requests for findings of fact, we feel that the Chancellor's findings should be amended by adding the following findings of fact:

47. The four male plaintiffs are employed by Clearview.

48. John J. Buckley is an engineer, a contractor, and the head of John J. Buckley, Inc., with considerable experience in the field of excavation and earth moving.

49. The City of Philadelphia has been dumping refuse at the Norwood site during 1961 and is continuing to dump there.

50. The City of Philadelphia does nothing more than dump its refuse at the Norwood site. The trucks then return immediately to the City of Philadelphia.

51. In November and December, 1960, the State Health Department threatened the Darby Township Health Authority with involuntary surrender of their administration of public health services in Darby Township because of their repeated failure to bring about compliance by Clearview with the minimum State health regulations pertaining to the operation of landfills.

52. The minimum regulations of the State Health Department pertaining to the operation of sanitary landfills throughout the State of Pennsylvania are those promulgated by the United States Public Health Service.

53. The regulations of the State Health Department pertaining to the operation of sanitary landfills are minimum requirements for the entire State of Pennsylvania.

54. The City of Philadelphia presently has agreements for the use of three other sites, where rubbish is dumped by the City, which agreements were not competitively bid.

We conclude this opinion by expressing our gratitude to both counsel for the City and for the taxpayers who by their expeditious cooperation, have made it possible for us to make an early determination of this issue, in order that an appeal may be taken and determined before the matter

becomes moot by the passage of time. The issues here presented are of profound importance to the City and to its taxpayers. Vital phases of the City's economy and of the part that City Council must perform in this and analogous contracts have been considered for the first time. It is well that we have lighted the beacon lamp which outlines and defines the channel to be followed and the shoals to be avoided. Whether our opinion stands is of minor consequence; it is most important that henceforth, all parties, especially the City's administrative and fiscal officers, as well as the City Council, are aware of their respective powers, rights and responsibilities. These the Chancellor has attempted to delineate in the public interest, and we affirm the end result of his labors.

ORDER.

And Now, to wit, this 31st day of July, 1961, after consideration of the briefs and arguments of counsel thereon, defendants' exceptions to the Chancellor's findings of fact are partially sustained, as incorporated herein, as amended findings of fact and additional findings of fact, respectively. All other exceptions to the findings of fact, conclusions of law, and decree nisi are dismissed. It is Ordered, Adjudged and Decreed that the decree nisi be entered as the final decree of the Court.

By THE COURT,

s/ Victor H. Blasc, *J.*

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: December 5, 1961

COHEN, *J.*

This appeal is by the City of Philadelphia from a final decree of the lower court decreeing that the contract between the City of Philadelphia (City) and the Landfill Corporation of Pennsylvania (Corporation) is a nullity, enjoining the City from using the facilities of Corporation, and further restraining the City from entering into similar contracts unless obtained by competitive bidding.

The chancellor based his conclusions chiefly on his determination that the agreement violated Sections 8-200(1) and 5-500(c) of the Philadelphia Home Rule Charter.[1]

Briefly the facts are:

With approval of both the managing director and the law department of the city, and after city council amended the budget of the streets department by transferring funds (the rental fixed by agreement) to the Department of Public Property, the City negotiated and entered into an agreement with Corporation for a dump site in Nor-

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1. Section 8-200(1). Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, competitive bids shall be secured before any purchase, by contract or otherwise, is made or before any contract is awarded for construction, alterations, repairs or maintenance or for rendering any services to the City other than professional services and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder.

Section 5-500(c) Sanitation. The Department shall itself, or when specifically authorized by the Council, by contract, clean and sand City streets, remove and dispose of ashes, garbage and refuse, remove and dispose of ice and snow from City streets, design, construct, repair, maintain and operate incinerators or other plants or equipment for the disposition of ashes, garbage and refuse, and administer and enforce statutes, ordinances and regulations for maintaining the cleanliness of City streets.

wood Borough, Delaware County, Pennsylvania. This agreement gave the City the privilege of dumping 500,000 cubic yards of refuse collected by City employees in the West Philadelphia area and taken to the dump site in City trucks by City employees who also perform the dumping operation. The agreement requires Corporation to operate a sanitary landfill upon said premises and to provide all required labor and equipment. No supervisory powers over Corporation's operation were retained by City. The major problem thus presented is whether this operation of landfill constitutes "rendering any services to the City" so that Section 8-200(1) of the charter requires City to secure those services only from the lowest responsible bidder.

The lower court held that since Section 5-500(e) of the city charter requires the streets department to "remove and dispose of . . . refuse" or, when "specifically authorized by Council," to contract for such disposition, the streets department had the duty not only to dump the refuse, but to perform the additional landfill function of doing away with it. Thus, the doing away with the refuse after it was dumped by the streets department was a service which City was required to perform, and the services should have been secured by bidding as required by Section 8-200(1) of the charter.

We do not believe that it was the intention of the framers of the city charter when they used the word "dispose" in Section 5-500(e) to require the streets department to completely *do away with* the ashes, garbage and refuse. It is more reasonable to conclude that the streets department's obligation, as imposed by the city charter, was to remove and *get rid of* the ashes, garbage and refuse. That is exactly what the City of Philadelphia did when it dumped the refuse on the land of the Corporation—it got rid of the debris. From then on it became the obligation of the Corporation to operate its own facility with its own employees and under its own supervision, and to do so in such

a manner as not to infringe upon or violate any of the health laws of the Commonwealth of Pennsylvania.

Obviously, the purpose of paragraph four[2] of the agreement, providing for a sanitary landfill, was not to require the performance of the landfill function as part of the consideration of the license to dump the debris; otherwise additional standards or requirements of performance would have been provided. The purpose of paragraph four was to protect City so that its right to dump would in no way be curtailed or interrupted because of Corporation's failure to abide by sanitary regulations and requirements of the Commonwealth, and hence cause City to lose the dumping site.

The decision of the framers of the charter not to require competitive bidding by City in obtaining sites for the dumping of debris is sound. It would be most impracticible to require competitive bidding, since all the factors, such as location of the site, layout of the site, available access to roads, traffic considerations, neighborhood sentiment and the type of debris, contribute to the uniqueness of the requirements and defy bid specifications.

The second issue concerns whether city council, under Section 5-500(c) of the charter must authorize a contract such as the one involved here and, if so, whether such authorization was actually granted here by council's amendment of the 1961 operating budget to add the $125,000 necessary for the execution of this contract. The lower court specifically ruled that council must authorize such a contract but did not give its reasons for refusing to hold that the amendment to the 1961 operating budget constituted such authorization.

Without holding that councilmanic authorization is required for the execution of this dumping contract, we

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2. "4. Licensor shall operate a sanitary landfill in and upon the said premises, and to that end shall provide all required labor, equipment, watchman, fire protection facilities, snow fences and all other necessary service and facilities."

feel that the above procedures engaged in by city council, acting upon the suggestions contained in the memorandum[3] supplied by the streets commissioner to the members of city council, satisfied the requirement of Section 5-500(e) and constituted councilmanic authorization for the execution of the dumping contract by City.

The lower court also erred in ruling that the commissioner of the streets department abused his discretion in negotiating the contract with Corporation. The court felt that there was adequate testimony to the effect that the costs involved were exorbitant in comparison to those at other landfill sites, and that the transaction reeked of personal and political favoritism.

Unfortunately, the chancellor in this case, both by his conduct in the court of the trial and by his adjudication, demonstrated obvious and extreme bias. The chancellor became so personally involved in this litigation that his

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3. "Buckley & Company, Inc., contractors, located at 1317 S. Juniper Street, Philadelphia, have submitted a contract proposal for the disposal of 500,000 cubic yards of city refuse at 25 cents a cubic yard on a 50 acre property located in the Borough of Norwood, Pennsylvania. This site is conveniently located to the Southwest Philadelphia collection area where fill sites have been virtually eliminated as a result of the Eastwick Redevelopment Project.

* * *

"At the present time, due to inadequate incinerator capacity, it is necessary to operate our incinerators in the Southeast, Southwest, and Northwest portions of the city six days per week. The Buckley proposal will enable us to reduce, if not eliminate, all of the Saturday overtime work at these incinerators at a savings which will approximately equal the $125,000 cost of this proposed contract. Elimination of the sixth day of operation in the City incinerators will result in reduced wear and tear and the eventual increased life of these facilities.

"It is therefore proposed that the 1961 Budget be amended to provide $125,000 for site rental in the Department of Public Property Operating Budget and to decrease the Streets Department personnel overtime cost figure by the equivalent $125,000. Approval of this change will not only help to solve the acute refuse disposal space problem, but will also improve incinerator plant life, all at no additional cost to the City."

examination and cross-examination of witnesses extended to over 2,000 questions, considerably more than the number of questions asked by counsel for the plaintiff-taxpayers. The admonition which Justice (now Chief Justice) Bell quoted in *Commonwealth v. Horn*, 395 Pa. 585, 591, 150 A. 2d 872 (1959), "It is always the right and sometimes the duty of a trial judge to interrogate witnesses, although, of course, questioning from the bench should not show bias or feeling nor be unduly protracted," is most applicable here. Thus, in addition to the two reversible errors discussed above, the extensive examination of witnesses, the unduly protracted questioning from the bench and the apparent display of bias and partisanship by the Chancellor vitiates the reliability of his findings and requires us to reverse his decree.

Decree reversed. Costs on appellees.

Mr. Chief Justice Bell files a dissenting opinion, in which Mr. Justice Jones joins.

DISSENTING OPINION OF THE SUPREME COURT OF PENNSYLVANIA

Filed: December 5, 1961.

BELL, *C. J.*

The majority opinion reverses the decree of the lower Court which had declared the contract between the City and Landfill Corporation a nullity and restricted the City from entering into similar contracts unless obtained by competitive bidding.

The majority decision in my judgment flies in the teeth of the City Charter and certainly vitiates its spirit, purposes and objectives. The Charter provides in Section 8-200(1), that "Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, *competitive bids shall be secured* * before any purchase, by contract or otherwise is made or *before any contract is awarded* for construction, alterations, repairs or maintenance or *for rendering any services to the City* other than professional services and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder."

The majority hold that this contract is not a contract for services but is a mere license to the City which simply permits the City to make a limited use of Landfill Corporation's land, to wit, dumping refuse for which the City pays $125,000 a year. The contract by its very terms demonstrates how utterly erroneous that interpretation is, and unless it is changed the Charter can easily be evaded, eroded and nullified by subterfuge. The contract pertinently provides: "4. Licensor [Landfill Corporation] shall *operate* a sanitary landfill in and upon the said premises, *and to that end shall provide all required labor*, equipment, watchmen, fire protection facilities, snow fences and

* Italics throughout, ours.

all other necessary service and facilities." City employees drive refuse to this dump site and deposit the refuse on the site; *Landfill then conducts a sanitary landfill operation on said premises.* The Deputy Street Commissioner of the City in a comprehensive written report on refuse disposal problems classifies sanitary landfills by private contractors as "services rendered to the city." His report pertinently states "It is also represented the first time in many years that the City spent an appreciable sum of money for privately-operated *refuse disposal service.*" This view was shared by the City witness who testified that in his opinion the contract here in question was one for services to the City.

This is not as the City contends merely a release of a site for dumping refuse; Landfill does far more than merely rent its land as a dump site. The majority opinion admits, as it must, that "The agreement requires Corporation to *operate* a sanitary landfill upon said premises and to provide all required labor and equipment. No supervisory powers over Corporation's *operation* were retained by City. . . .

". . . the City of Philadelphia . . . dumped the refuse on the land of the Corporation—it got rid of the debris. From then on it became the obligation of the Corporation to *operate* its own facility with its own employees and under its own supervision. . . ." Since it is to "operate" a landfill, it is obviously rendering a service as both the language of the contract and the acts of Landfill clearly demonstrate.

The majority opinion also relies upon the uniqueness of a site for a dump refuse. The alleged uniqueness of such a site cannot possibly fall within the charter provision which specifically excepts the purchase of a unique article from the requirement of a competitive bid. By no stretch of the imagination can the workings and sanitary processing of a landfill operation be considered the purchase of a unique article.

The deplorable evils which are certain to flow from the majority's construction of the City Charter are already evident in the instant case. We agree with the lower Court (a) that there was adequate testimony to show that the costs involved in this privately and uncompetitively negotiated landfill operation were exorbitant in comparison with the costs paid to operators of other landfill operations, and (b) "that the transaction reeked of personal and political favoritism," and (c) that the City (acting through the Commissioner of Streets) abused its discretion in making this contract with Landfill Corporation.

We quote with approval the following language from the opinion of the Court en banc: "It [the City] is here attempting to justify a privately negotiated contract, being well aware that should its efforts succeed, the result would be the creation of a rent in the civic and fiscal fabric of the Charter which, once opened, could be widened by subsequent administrative edict or councilmanic enactment. If its viewpoint is to receive judicial sanction, henceforth, all work done for the City, and specifically defined or interpreted by the City's executive or legislative officers not to be 'for construction, alterations, repairs or maintenance or for rendering any services to the City' could be awarded through the medium of a privately negotiated contract. To pose the question is to supply its answer. We shall and will not, by sustaining the City's viewpoint, open the door that inevitably leads to the evils which this section of the Charter was specifically enacted to prevent and prohibit."

I would affirm the decree on the opinion of Judge Blanc which, speaking for the Court en banc, convincingly answers all of the majority's conclusions and likewise refutes in detail all of the City's contentions.

Mr. Justice Jones joins in this Dissenting Opinion.